

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:RFP:CHI:2:TL-N-4267-01  
MJCalabrese

date: August 9, 2001

to: Fred G. Mueller, Revenue Agent 4659 OLY  
LMSB:HCT:1726

from: Associate Area Counsel (LMSB), Chicago

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subject: Opinion - Consent to Extend and Transferee Liability

Taxpayer: [REDACTED]

This memorandum responds to your request for assistance dated July 11, 2001. It does not appear that there is an issue in this case that requires coordination with an industry counsel. This memorandum should not be cited as precedent.

**ISSUES**

1. Does a corporate merger result in [REDACTED] being liable as transferee for the tax liabilities of [REDACTED] [REDACTED]?

2. What should be the wording of a consent to extend the assessment limitations period for [REDACTED] [REDACTED] for the years [REDACTED], [REDACTED], and the period ending [REDACTED]?

**CONCLUSIONS**

1. The corporate merger results in [REDACTED] becoming the successor in interest for [REDACTED]. As a protective measure, [REDACTED] may also be treated as a transferee for the tax liabilities of [REDACTED].

2. The Form 872 consent to extend the assessment limitations period for [REDACTED] for the years [REDACTED], [REDACTED], and the period ending [REDACTED] should

read as "[REDACTED] (EIN: [REDACTED])<sup>1</sup> as successor in interest to [REDACTED] (EIN: [REDACTED]) \*". At the bottom of the page, the following language should be added (including the asterisk):

\* This is with respect to the consolidated tax liability of the [REDACTED] (EIN: [REDACTED]) consolidated return group for the taxable years [REDACTED], [REDACTED], and the period ending [REDACTED].

#### FACTS

The revenue agent is examining the returns of [REDACTED] for the years [REDACTED], [REDACTED], and the period ending [REDACTED]. On [REDACTED], the taxpayer merged into [REDACTED], a subsidiary of [REDACTED]. The return for the period ending [REDACTED] was the taxpayer's final return. [REDACTED] was a savings institution holding company organized under the laws of the State of Delaware.

[REDACTED] carried back to [REDACTED] a net operating loss from the period ending [REDACTED], resulting in a \$ [REDACTED] tentative refund. As a result, the agent advises, the examination falls under the Joint Committee guidelines.

#### 1. Merger of [REDACTED] and [REDACTED]

On [REDACTED], [REDACTED], [REDACTED], and [REDACTED] entered into an Agreement and Plan of Merger. The merger did not occur until [REDACTED].

[REDACTED] is a bank holding company organized under the laws of Illinois. As of [REDACTED], [REDACTED] owned, either directly or through subsidiary holding companies, [REDACTED] banks, including [REDACTED], and [REDACTED].

[REDACTED], a Delaware Corporation organized to facilitate the merger, was a wholly owned subsidiary of [REDACTED]. The taxpayer's representative describes [REDACTED] as a temporary company with no operations, assets, or

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<sup>1</sup> We do not have the EIN for [REDACTED]. The number, of course, will need to be inserted in the Form 872.

liabilities that was formed just prior to the merger and dissolved upon the merger.

The agreement provided that, by virtue of the merger, [REDACTED] stock converted to a right to receive cash. Upon surrender for cancellation of their shares of corporate stock, the pre-acquisition shareholders of [REDACTED] received cash from [REDACTED].

The merger agreement also called for [REDACTED]'s purchase of [REDACTED] stock options and for the retirement and cancellation of any [REDACTED] treasury stock. Each share of \$ [REDACTED] par value common stock of [REDACTED] was converted into and exchanged for one share of \$ [REDACTED] par value common stock of [REDACTED]. See Merger Agreement, Article I(i) and (k).

The agreement provided that upon acquisition, [REDACTED]'s separate existence would cease, and [REDACTED] continued as the surviving corporation. However, the agreement also provided that the transaction may be structured such that [REDACTED] merges "into another direct or indirect wholly-owned subsidiary of [REDACTED] . . . ." Agreement and Plan of Merger, Article I(a). The taxpayer's representative advised the agent that [REDACTED] was merged with and into [REDACTED] and that the separate existence of [REDACTED] ceased to exist.<sup>2</sup> Consistent with this explanation, [REDACTED] does not appear on the [REDACTED] corporate organization chart for [REDACTED].

## 2. Merger of the Subsidiaries [REDACTED]

Prior to the merger, [REDACTED] owned [REDACTED] % of [REDACTED], a federally chartered stock savings institution. [REDACTED], in turn, owned two subsidiaries, each of which also owned one or two other subsidiaries. The only other corporation owned by [REDACTED] was an inactive company.

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<sup>2</sup> We have not seen documentation of [REDACTED]'s actual merger into [REDACTED]. Perhaps, instead of merging into [REDACTED], [REDACTED] ceased to exist as a result of the cancellation of all its stock, with its assets contained in [REDACTED]. It would be helpful for the taxpayer to clarify these facts. (As discussed in the next section, [REDACTED] merged into [REDACTED], a subsidiary of [REDACTED].)

The merger plan also called for the merger of [REDACTED] with and into [REDACTED], a federally chartered stock savings corporation, was a wholly owned subsidiary of [REDACTED].

[REDACTED] merged immediately following the merger of [REDACTED]. [REDACTED] was the surviving corporation. Upon merger, the separate existence of [REDACTED] ceased.

### 3. Post-acquisition Events

On [REDACTED], [REDACTED] entered into an Agreement to Purchase Assets and Assume Liabilities. [REDACTED] was wholly owned by [REDACTED], which, in turn, was wholly owned by [REDACTED]. The agreement provided for the transfer of [REDACTED] branch operations from [REDACTED] to [REDACTED].

The [REDACTED] mergers qualified as I.R.C. § 368(a)(1)(A) tax free reorganizations. The taxpayer's representative described the transactions as reverse triangular mergers and he said that neither transaction constituted a reverse acquisition or downstream transfer.

## ANALYSIS

### 1. Transferee liability

Article I(c) of the Merger Agreement provides that the merger shall have the effects set forth in Delaware General Corporation Law. Several effects occur under Delaware law. The two separate (or constituent) corporations of the merger become one, with all the rights, powers, duties and restrictions of the two separate corporations. The property of the two separate corporations becomes the property of the surviving corporation. And, with respect to liabilities, "all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or

contracted by it." 8 Del. C. Ch. 1, § 259.<sup>3</sup>

Thus, the merger results in the pre-merger liabilities of [REDACTED] becoming the liabilities of the surviving or resulting corporation. In addition, Article I(c) of the merger agreement specifically provides that "all debts, liabilities and duties of the Constituent Corporations shall become the debts, liabilities and duties of the Surviving Corporation."

I.R.C. § 6901 provides for the assessment and collection of taxes from the transferee of a taxpayer. The section, however, does not create the substantive transferee liability, which must be established under state law. See Stern v. Commissioner, 357 U.S. 39 (1958); Hagman v. Commissioner, 100 T.C. 180 (1993); Allen v. Commissioner, T.C. Memo. 1999-385.

Transferee liability generally arises upon the transfer of assets from one person to another at a time when the transferor is insolvent or is rendered so by the transfer. In Illinois, transferee liability generally derives from the state's fraudulent conveyance laws. See 740 ILCS 160.

A successor corporation's agreement to assume liabilities may give rise to contractual transferee liability. Kamen Soap Products Co. v. Commissioner, 230 F. 2d 565 (2nd Cir. 1956); Southern Pacific Transportation v. Commissioner, 84 T.C. 375 (1985). In a merger, the successor corporation has the assets of the old (no longer existing) corporation.

The transaction in this case involved the acquisition and statutory merger of [REDACTED] into the [REDACTED] affiliate group. [REDACTED] has no separate existence outside of the [REDACTED] affiliated group.

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<sup>3</sup> The effect under Illinois law would be similar. 805 ILCS § 11.50 is entitled "Effect of merger, consolidation or exchange". It provides, in part, that the

surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated . . . . Neither the rights of creditors nor any liens upon the property of any such corporations shall be impaired by such merger or consolidation.

The chapter on transferee cases in the Examining Officer's Guide, a copy of which accompanied your opinion request as Ex. 12, states that "[s]tatutory mergers where the surviving corporation is primarily liable for the debts of the merged corporation do NOT result in a transferee situation." <sup>4</sup> The "corporate merger, transferee-transferor" portion of the Examining Officer's Guide, a copy of which accompanied your opinion request as Ex. 11, states that where "the surviving entity is primarily liable for the debts of the merged or consolidated corporation, the statute will be extended by using Form 872 or 872-A."

In this case, the [REDACTED] merger results in [REDACTED] and [REDACTED] being primarily liable for the tax liabilities of [REDACTED]. In accordance with the policy reflected in the Examining Officer's Guide, we may treat the matter as governed by the transferor's three year limitations period. The assessment limitations period should be extended with a Form 872 or Form 872-A.

Still, an argument can be made that [REDACTED] and [REDACTED] are also liable as transferees, because, pursuant to the terms of the merger agreement, they assumed the liabilities of [REDACTED]. In addition, they possess the assets of the [REDACTED], while [REDACTED] no longer exists to pay its liabilities.

As a protective measure, the Service may secure a Form 2045, Transferee Agreement, and a Form 977, Consent to Extend the Transferee Statute of Limitations. Under I.R.C. § 6901(c)(1), the Service has one year after the expiration of the period of limitations for assessment within which to make an assessment against the initial transferee. The transferee forms should read as follows:

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<sup>4</sup> We note that in the Appeals Process Chapter of the Internal Revenue Manual, § 8.7.1, Guidelines for Cases with Special Issues, it states as follows:

In the case of a statutory merger, consolidation or a mere change in identity, form, place or organization, the new or surviving corporation has been held to be the same as the old. The new or surviving corporation is primarily liable for the debts of the old. Therefore, take action against the new or surviving corporation within the statutory period of limitation for assessment against the transferor.

[REDACTED] (EIN: [REDACTED]) as transferee of [REDACTED]  
[REDACTED] (EIN: [REDACTED]).

For [REDACTED], simply substitute its name and EIN for that of [REDACTED].

## 2. Names on the Form 872

An adjustment to the return of a subsidiary impacts the consolidated return tax liability of the parent. As a general rule, a common parent serves as sole agent for each subsidiary in its affiliated group for all tax matters for the consolidated return year. This responsibility includes signing consents to extend the assessment limitations period. See Treas. Reg. §§ 1.1502-77(a) and 1.1502-77(c); Southern Pacific Co. v. Commissioner, 84 T.C. 375 (1985). The parent's signature binds as if signed by each member of the group.

The agent is investigating the liability of [REDACTED] for the years [REDACTED], [REDACTED], and the period ending [REDACTED]. For this period [REDACTED] was the parent of a consolidated group. After the [REDACTED] merger, the banking operations of [REDACTED] and its subsidiary [REDACTED] merged into [REDACTED], a subsidiary of [REDACTED].

Where the common parent remains in existence, even if it no longer is the common parent, it remains the agent for the group with regard to years in which it was the common parent for the group. Treas. Reg. 1.1502-77(a); 1.1502-77T(a)(4)(i). If it ceases to exist, the common parent can no longer extend the statute of limitations. The regulations provide alternative agents when the common parent ceases to be the common parent, whether or not the group remains in existence. Treas. Reg. § 1.1502-77T.

[REDACTED] statutorily merged into [REDACTED]. [REDACTED] ceased to exist as a separate entity. [REDACTED] is the successor in interest under state law. [REDACTED] is the proper party to execute a Form 872 regarding [REDACTED]'s taxable years [REDACTED], [REDACTED], and the period ending [REDACTED]. Treas. Reg. § 1.1502-77T(a)(4)(ii).

The Form 872 should show the name of the taxpayer as "[REDACTED] (EIN: [REDACTED]) as successor in interest to [REDACTED] (EIN: [REDACTED]) \*." At the bottom of the page, the following language should be added (including the asterisk):

\* This is with respect to the consolidated tax liability of the [REDACTED] (EIN: [REDACTED]) consolidated return group for the taxable years [REDACTED], [REDACTED], and the period ending [REDACTED].

The signature line should identify the taxpayer as [REDACTED] as successor in interest to [REDACTED].

If you have any questions on this matter, please call Michael Calabrese of this office at (414) 297-4241.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

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By: \_\_\_\_\_  
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